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No. 1136

In the Supreme Court of the United States

OCTOBER TERM, 1967

EDITH COLBERT FINCH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND STEWART UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 387 F. 2d 13. The opinion of the district court (Pet. App. B) is reported at 263 F. Supp. 309. The administrative decision, which became the Secretary of the Interior's final order (Pet. App. A), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1967. The petition for a writ of certiorari was filed on February 20, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

294-223—68

QUESTION PRESENTED

Whether the Secretary of the Interior's rejection of petitioners' applications for the allotment of specific tracts of land was proper.

STATUTES INVOLVED

Section 4 of the General Allotment Act of 1887, 24 Stat. 389, as amended, 25 U.S.C. 334, provides:

> Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or Executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in sections 331–334, 339, 341, 342, 348, 349 and 381 of this title for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as provided in sections 348 and 349 of this title. * * *

Section 7 of the Taylor Grazing Act, June 28, 1934, 48 Stat. 1272, as amended by Section 2 of the Act of June 26, 1936, 49 Stat. 1976, 43 U.S.C. 315f, reads as follows:

> Sec. 7. That the Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved

by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lien, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: * * *

STATEMENT

Petitioners, each of whom is of Indian descent, filed applications with the Bureau of Indian Affairs and received certificates that they were eligible to receive an allotment of land pursuant to the General Allotment Act of 1887, 25 U.S.C. 334. Thereafter, petitioners selected lands which they desired and applied to the Bureau of Land Management to have these lands allotted to them. However, the lands which petitioners selected had previously been withdrawn from settlement by Executive Order No. 6910 and, pursuant to the provision of the Taylor Act, had been classified as grazing land by the Secretary of the Interior. Petitioners, therefore, also asked the

Bureau of Land Management to reopen the land for settlement pursuant to its authority under the Taylor law.

After considering the topography, vegetation, land tenure pattern and general economy of the area, the Bureau of Land Management found that the land in question was not suitable for agricultural purposes and would not support an Indian family. The Bureau concluded that the land was not suited for an Indian allotment and, therefore, rejected petitioners' applications.[1]

Petitioners instituted this action to compel the Secretary of the Interior to allot to them the lands which they had selected. The district court sustained the Secretary's determination that petitioners were not entitled to have the specific land in question allotted to them and, therefore, dismissed the complaint. The court of appeals affirmed.

ARGUMENT

Petitioners' basic contention is that the General Allotment Act of 1887 conferred on them a vested right to select for allotment any land that was available for settlement at the time that Act was passed, regardless of any subsequent action by Congress or the Executive. However, there is no statutory basis for petitioners' claim of a vested right to allotment of specific lands. While Section 4 of the General Allotment Act of 1887 confers a right to an allotment, it is clear

[1] The findings and conclusions of the Land Office became those of the Secretary of the Interior when he failed to act within thirty days upon appellants' request for review. 43 C.F.R. § 2411.1-1(d), (e).

that it confers no right to specific lands. Section 4 itself requires that the public lands selected be "not otherwise appropriated."[2] Here the land which petitioners selected has been "otherwise appropriated" by withdrawal from all entry until favorable classification by the Secretary, "in his discretion," pursuant to Section 7 of the Taylor Grazing Act of 1934, 48 Stat. 1272, as amended, 43 U.S.C. 315f.[3]

Petitioners' assertion of a vested right to allotment of particular lands is contrary to the decided cases and the consistent administrative construction of the relevant statutes. In *LaRoque* v. *United States,* 239 U.S. 62, 65, this Court quoted with approval the statement in *Woodbury* v. *United States,* 170 Fed. 302, 305 (C.A. 8), that "Until the allotment was made, Woodbury's right was personal—a mere float—giving him no right to any specific property." See, also, *Wise* v.

[2] Section 4 also requires that the Indian seeking the allotment shall have "settled" on the land. Petitioners had not settled on the land which they sought.

[3] In amending Section 7 of the Taylor Grazing Act of 1934, Congress in 1936 expressly acknowledged the withdrawal effected by Executive Order No. 6910 and thereby ratified it. Section 2 of the Act of June 26, 1936, 49 Stat. 1976, 43 U.S.C. 315f; cf. *Brooks* v. *Dewar*, 313 U.S. 354, 360–361. There is thus no substance to petitioners' assertions that the Secretary has usurped a function of Congress or that the Secretary has abused his statutory authority.

That Congress did not intend to confer unqualified rights to any lands selected also appears from Section 4 of the Act of February 28, 1891, 26 Stat. 795, as amended by Section 17 of the Act of June 25, 1910, 36 Stat. 860, 25 U.S.C. 336, which supplemented the General Allotment Act in providing that "such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper * * *."

United States, 297 F. 2d 822, 825–827 (C.A. 10), certiorari denied, 369 U.S. 876 ("Enactment of allotment legislation does not of itself vest any rights to allotments."); *Lemieux* v. *United States,* 15 F. 2d 518, 521–522 (C.A. 8), certiorari denied, 273 U.S. 749; *Daniels* v. *United States,* 247 F. Supp. 193, 194–195 (W.D. Okla.);[4] *Raymond Bear Hill,* 52 L.D. 688, 691–692; *Allotment Selections on the Fort Belknap Indian Reservation,* 55 I.D. 295, 301–304; *John E. Balmer,* 71 I.D. 66, 67–68; *Clark Jr.* v. *Benally,* 51 L.D. 98, 101.

Finally, the Secretary's refusal in this case to reclassify the land in question and allot it to petitioners was entirely proper. The thrust of the allotment process was to place Indians in possession and ownership of agricultural lands which would sustain an Indian family engaged in pastoral pursuits.[5] See *United States* v. *Payne,* 264 U.S. 446, 448–449; *Wise* v. *United States,* 297 F. 2d 822, 825 (C.A. 10), certiorari denied, 369 U.S. 876; *Daniels* v. *United States,* 247 F. Supp. 193, 195 (W.D. Okla.); *John E. Balmer,* 71

[4] Claims similar to those of petitioners are awaiting decision by the Ninth Circuit in *Amos Hopkins (Dukes) v. United States and Udall* (No. 21456, argued Dec. 4, 1967).

[5] It is thus irrelevant that the lands selected may be valuable for uses other than agricultural or may support limited seasonal grazing, or that the Indian applicant desires the lands to supplement his income (Pet. 10), or that the availability of agricultural (including grazing) lands has diminished (Pet. App. D xxvi).

I.D. 66, 67–68.[6] Petitioners do not challenge the Secretary's findings, after extensive field examination, as revealed by the administrative record (Pet. App. A i-x), that the public lands here involved are not suited for agricultural use.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Petitioners' reliance on the Forest Reserve cases, *United States* v. *Northern Pac. Ry. Co.*, 256 U.S. 51, and *United States* v. *Northern Pacific Ry. Co.*, 311 U.S. 317, is misplaced. No rights in specific lands were vested by the General Allotment Act, as previously shown. Since Congress has plenary power to dispose of property held by the United States, to the extent that private rights have not vested, *Alabama* v. *Texas*, 347 U.S. 272, 273–274, *Gibson* v. *Chouteau*, 13 Wall. 92, 99, there is no merit in petitioners' claim of a taking of property contrary to the Fifth Amendment, U.S. Const. (Pet. 11–13).

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